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PRE-APPEAL BRIEF REQUEST FOR REVIEW		Docket Number (Optional) 31176280-040001	
I hereby certify that this correspondence is being deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to "Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450" [37 CFR 1.8(a)]		Application Number 10/781269	Filed February 18, 2004
on <u>May 25, 2006</u>		First Named Inventor Ronald Wevers	
Signature <u><i>Paul Lilly</i></u>		Art Unit 1772	
Typed or printed name <u>Paul Lilly</u>		Examiner Marc A. Patterson	
<p>Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request.</p> <p>This request is being filed with a notice of appeal.</p> <p>The review is requested for the reason(s) stated on the attached sheet(s). Note: No more than five (5) pages may be provided.</p> <p>I am the</p> <p><input type="checkbox"/> applicant/inventor.</p> <p><input type="checkbox"/> assignee of record of the entire interest See 37 CFR 3.71. Statement under 37 CFR 3.73 (b) is enclosed. (Form PTO/SB/96)</p> <p><input checked="" type="checkbox"/> attorney or agent of record. Registration number <u>50,996</u></p> <p><input type="checkbox"/> attorney or agent acting under 37 CFR 1.34 Registration number if acting under 37 CFR 1.34 _____</p> <p>NOTE: Signatures of all the investors or assignee of record of the entire interest or their representative(s) are required. Submit multiple forms if more than one signature is required, see below*.</p>			

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May 25, 2006

Date

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Applicants: Ronald Wevers et al.

Serial No.: 10/781269

Filed: February 18, 2004

Title: Multilayer Structures

PATENT

Atty Docket No. 31176280-040001 (44419A US)

Group Art Unit: 1772

Examiner: Marc A. Patterson



PRE-APPEAL BRIEF REQUEST FOR REVIEW

In response to the Final Office Action mailed April 6, 2006, the Applicants respectfully request reconsideration of the application in view of the following remarks. Claims 25-42 are currently pending. The following rejections remain and are discussed briefly herein:

1. Claims 25, 30-33, and 39-40 are rejected under 35 U.S.C. §103(a) based on the combination of U.S. Pat. Nos. 5,872,201 (the '201 patent), 5,869,575 (the '575 patent) and 5,677,029 (the '029 patent).
2. Dependent claims 26, 28-29, 34-38, and 41-42 are rejected under 35 U.S.C. §103(a) based on the combination of the '201 patent, the '575 patent, the '029 patent, and U.S. Pat. No. 6,190,768 (the '768 patent).
3. Dependent claim 27 is rejected under 35 U.S.C. §103(a) based on the combination of the '201 patent, the '575 patent, the '029 patent, the '768 patent and U.S. Pat. No. 4,957,968 (the '968 patent).

Due to the page limit, the following arguments are a distillation of the detailed arguments previously made of record. Thus, the Applicants respectfully request the Panel to consult the Applicants' prior responses if necessary.

THE CLAIMED INVENTION

The present claims recite a multilayer structure having a drape angle greater than 35 degrees and comprising two layers, layer (A) and layer (B). Layer (A) is selected from a woven or non-woven fabric made of natural or man-made textile fibers made of wool, cotton, silk, linen, regenerated cellulose, cellulose acetate, a polyamide, an acrylonitrile homo- or copolymer, a polyethylene glycol terephthalate, a polyester, or mixtures thereof. Layer (B) is polymeric layer comprising a substantially random interpolpolymer made from i) one or more α -olefin monomers and ii) one or more vinyl or vinylidene aromatic monomers and/or one or more sterically hindered aliphatic or cycloaliphatic vinyl or vinylidene monomers. Layer (B) is also free from tackifier or comprises less than 5 percent tackifier, based on the total weight of tackifier and substantially random interpolpolymer. Tackifiers are usually necessary in polymers used in multilayer structures to aid in bonding and durability. The claimed multilayer structures are useful for garments, particularly weatherproof garments. One feature that is highly desirable for any fabric used in garment-making is its characteristic drape. Particularly for weatherproof garments, multilayer structures or fabrics that lack acceptable drape

characteristics feel stiff and bulky. The claimed multilayer structures provide the improved drape character thus providing a weatherproof material that has a desirable look and feel to consumers.

REJECTION OF CLAIMS 25, 30-33, AND 39-40 UNDER 35 U.S.C. §103

THE '201 PATENT FAILS TO ESTABLISH A *PRIMA FACIE* CASE OF OBVIOUSNESS AGAINST THE CLAIMS BECAUSE IT DOES NOT DISCLOSE THE SPECIFIC COMPONENTS OF LAYER (A) OR THE COMPOSITION USED IN LAYER (B) OF THE CLAIMED MULTILAYER STRUCTURES

The '201 patent fails to establish a *prima facie* case of obviousness because it does not teach or suggest either of the two layers of the claimed multilayer structure.

For example, Layer (B) comprises the recited substantially random interpolymers that has less than 5 percent of a tackifier. But, there is no discussion whatsoever of tackifiers in the '201 patent. The Examiner states that "the structure disclosed by [the '201 patent] does not comprise [a] tackifier unless [the 201 patent specifically disclose [sic.] the addition of a tackifier." *Final Office Action, page 4, second full paragraph*. The Examiner's reasoning is contrary to the law established in *In re Evanega*, 4 USPQ2d 1249 (Fed. Cir. 1987) (stating that the mere absence from a reference of an explicit requirement cannot reasonably be construed as an affirmative statement that the requirement is in the reference).

With respect to Layer (A), the '201 patent is also silent. The '201 patent makes only a generic disclosure that the substantially random interpolymers described therein "can be utilized to produce a wide range of fabricated articles ... or as components of a multilayered structure." *Col 2, ll. 33-37*. Such a generic disclosure is insufficient to establish a *prima facie* case of obviousness. *In re Baird*, 16 F.3d 380, 382, 29 USPQ2d 1550, 1552 (Fed. Cir. 1994) ("The fact that a claimed compound may be encompassed by a disclosed generic formula does not by itself render that compound obvious.")

THE '201 PATENT FAILS TO ESTABLISH A *PRIMA FACIE* CASE OF OBVIOUSNESS AGAINST THE CLAIMS BECAUSE IT DOES NOT DISCLOSE MULTILAYER STRUCTURES HAVING THE CLAIMED DRAPE ANGLE

In addition to failing to teach or suggest the compositional features of both Layer (A) and Layer (B) of the multilayer structures, the '201 patent fails to teach multilayer structures that have the recited drape angle. There is no suggestion that the compositions described therein would provide structures with desirable properties such as improved drape. To the extent that such properties might be inherent, the Applicants note that obviousness cannot be established by what is not known, even where properties may be inherent. *In re Spormann*, 53 CCPA 1375, 1380, 363 F.2d 444, 448 (C.C.P.A. 1966).

THE '575 PATENT IN COMBINATION WITH THE '201 PATENT FAILS TO ESTABLISH A *PRIMA FACIE* CASE OF OBVIOUSNESS AGAINST THE CLAIMS BECAUSE THE COMBINATION FAILS TO TEACH OR SUGGEST EACH AND EVERY CLAIM LIMITATION

To cure these deficiencies the Examiner has cited the '575 patent and the '029 patent. Specifically, the '575 patent was cited as teaching that a fiber made from an ethylene interpolymers is equivalent to a fiber made from a blend of an ethylene interpolymers and cotton. From this teaching, the Examiner asserts that such a fiber wherein an ethylene interpolymers is blended with cotton renders obvious a multilayer structure wherein the cotton (i.e. Layer (A)) and a substantially random interpolymers (i.e. Layer (B)) are separate layers. Such a rejection is an improper determination of obviousness.

THERE IS NO MOTIVATION TO COMBINE THE '575 PATENT WITH THE '201 PATENT BECAUSE THE '575 PATENT SUGGESTS BLENDS WHILE THE '201 PATENT SUGGESTS MULTILAYER STRUCTURES

A teaching that a fiber or fabric may be made by blending a particular polymer with cotton is not a teaching or suggestion to make a multilayer structure including separate layers of such components. There is no reason to believe that the improved thermal stability of a blend of cotton and an ethylene polymer as suggested in the '575 patent is relevant to desirable drape properties in a multilayered structure. In a blend, the properties are determined by the interaction between the components. Thus, a suggestion that a blend may have useful properties is irrelevant to a multilayer structure having distinct layers of the blend components. The polymers of the '575 patent do not even appear to be substantially random interpolymers. The '575 patent is silent with respect to the presence of a tackifier. And the '575 patent is also silent with respect to the drape angle. Thus, there is no motivation to combine the '575 patent with the '201 patent and the combination does not suggest each limitation of the claims.

THE '029 PATENT IN COMBINATION WITH THE '575 PATENT AND THE '201 PATENT FAILS TO SUGGEST EACH LIMITATION OF THE CLAIMS AND THERE IS NO MOTIVATION TO COMBINE THE REFERENCES

The '029 patent was cited as disclosing fabrics that have the recited drape angle. **But the '029 patent is related to particular patterns by which sections of fabric are held together by securing means such as bolts, rivets, adhesives, staples, and stitches to form ballistic resistant garments. Column 3, lines 60-64.** With respect to particular polymers, the '029 patent generically discloses that the polymer may be any thermoplastic, thermosetting resin, or a combination of the two. The description does not teach or suggest the polymers of Layer (B) of the present claims. Like the '201 and '575 patents, the '029 patent is also silent about the absence of a tackifier.

As mentioned above, the '029 patent teaches that the drape properties of the fabrics disclosed therein are related to the way the individual segments of a piece of fabric are connected. There is no teaching or suggestion that the segments themselves have the recited drape angle. In contrast, the drape angle of the claimed multilayer structures is determined from a 200 mm x 200 mm portion of the multilayer structure. *Specification, page 28, lines 5-13*. **There certainly can be no motivation to combine a reference directed to the specific connectivity of segments of fabric with a reference teaching fibers or a reference suggesting multilayer laminated structures.**

THE COMBINATION OF THE '029 PATENT, THE '575 PATENT, AND THE '201 PATENT IS IMPROPER BECAUSE IT IS BASED ON HINDSIGHT

The Examiner's determination of obviousness appears to be based on a combination of features selectively culled from the prior art to fit the parameters of the claimed invention. Perhaps the best evidence of this is the Examiner's "Answers to Applicant's Arguments" in the Final rejection of April 6, 2006, which sequentially enumerates the claimed elements and a reference in which the element is asserted to be disclosed.

With respect to the references themselves, the '201 patent generically discloses that certain substantially random polymers can be used to make multilayer structures. But it is silent with respect to all other claim limitations. The '575 patent is cited for its disclosure of fibers of polyethylene/cotton blends as suggesting that cotton could be used with the polymers of the '201 patent in the recited multilayer structure. Multilayer structures are not blends. The '029 patent is cited for the disclosure of the drape angle despite its failure to describe the claimed substantially random polymers as being suitable therein. Moreover, the drape properties in the '029 patent are achieved by the way individual fabric **segments are fastened together by bolts, rivets, adhesives, staples, or stitches**. As discussed above, these teachings are selected without considering the references as a whole. Such a piecing together of individual teachings that are selectively culled from the prior art is an improper use of hindsight. *ATD Corp. v. Lydall, Inc.*, 48 USPQ2d 1321 (Fed. Cir. 1998); *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971); *Sensonics, Inc. v. Aerosonic, Corp.*, 38 USPQ2d 1551 (Fed. Cir. 1996).

REJECTION OF CLAIMS 26, 28-29, 34-38, AND 41-42 UNDER 35 U.S.C. §103

The rejection of dependent claims 26, 28-29, 34-38, and 41-42 under 35 U.S.C. §103 is based on the disclosures of the '029 patent, the '575 patent and the '201 patent in combination with the '768 patent's disclosure of adhesives. But this rejection is improper due to the deficiencies of the base references described

above. The '768 patent does nothing to cure these deficiencies because it is directed to fibers and fabrics made from fibers. Woven fabrics are not multilayer structures. The nonwoven fabrics of the '768 patent are made by spin-lacing or hydrodynamic entanglement – in other words, not fabrics with distinct layers. *Column 6, lines 20-25*. And regardless of its other teachings, such fibers are not disclosed as 200 mm x 200 mm portions. Thus, the fibers of cannot meet the recited drape angle, regardless of their structure. Thus, the disclosure of the use of an adhesive in this context is irrelevant to the claimed multilayer structures. Consequently, it again appears that the Examiner has selectively culled the adhesive limitation from this reference to fit the parameters of the claimed invention using hindsight.

REJECTION OF CLAIM 27 UNDER 35 U.S.C. §103

The rejection of claim 27 is based on the disclosures of the '029; the '575; the '201; and the '768 patents coupled with the '968 patent's disclosure regarding adhesives. The '968 patent fails to cure the deficiencies of the combination of the four other cited references because the '968 patent is directed to adhesive compositions that are tested for adhesion to aluminum, copper, stainless steel, chrome plated steel and tin as well as generally for polypropylene surfaces. There is no suggestion that they would be suitable for use with the substantially random interpolymers of Layer (B) of the present claims and the materials recited for Layer (A) of the claimed multilayer structures. Again, the Examiner has selectively culled the adhesive limitation from this reference to fit the parameters of the claimed invention using hindsight. In any event, the reference does not address or cure the deficiencies of the base references.

Respectfully submitted,

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